CHIN CHOON

v.

CHUA JUI MENG

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: W-02-372-2000]
14 OCTOBER 2004

TORT: *Damages - Defamation - Libel - Compensatory, aggravated and exemplary damages - Fair quantum - Separate award for each head - Whether against practice - Awards thereof - Whether to be globalised*

The appellant, an advocate and solicitor, had published a libel against the respondent, the Deputy Minister for International Trade and Industry. The defamatory statement, which was published in two Chinese newspapers, spoke of the appellant as having 'boxes of evidence' that the respondent was corrupt and had accepted gratification of RM500,000 or RM600,000. At the trial, the appellant could not however prove his allegations, and was forced to abort his justification plea. The learned judge, in the circumstances, found the appellant liable and ordered him to pay RM500,000 in damages in respect of each of the three categories of damages (compensatory, aggravated and exemplary). Aggrieved, the appellant appealed and argued that the RM1.5 million award was excessive, that the respondent deserved only nominal damage, and that, since he did not profit monetarily from the attack on the respondent, the award for exemplary damages was unwarranted and unjustified. It was further argued that the learned judge ought to have awarded a global quantum, instead of apportioning the sums under the respective categories.

Held (setting aside and substituting the award of the High Court)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] Bearing in mind the appellant's conduct, aggravated damages is justified and should be awarded. Here is a case of an arrogant appellant who not only put a plea of justification on record but said that he had 'boxes of evidence' against the respondent to show that the latter had accepted RM500,000 or RM600,000. The boxes, as it transpired, were empty and the plea of justification was withdrawn. (p 575 e)

[2] It is not a fair interpretation of Lord Devlin's speech in *Rookes v. Barnard* [1964] AC 1129 to say that he had intended that grant of punitive or exemplary damages should be limited to cases of monetary profit. That is too narrow an interpretation. On the contrary, any form of advantage gained by a defendant in a defamation case suffices. Further, such an advantage need not produce an immediate profit in money terms. Suffice that it produces an immediate non-pecuniary advantage that may later translate into a monetary reward. (p 575 h & 576 a-b)

[2a] The appellant, by his tortuous act, had wanted to impress upon members of the Chinese community that he was an advocate who feared no one, not even a Deputy Minister of the Government, when it came to advancing his client's cause. Reasonable persons who read his statement may well decide to retain his services because of the impression created by him. So the appellant stood to gain from what he did. Accordingly, this is a suitable case to make an award of exemplary damages. (p 576 c)

[3] The High Court should not be making separate awards for aggravated and exemplary damages, but should instead maintain the age-old practice of making a global award so as to limit the size of awards. Be that as it may, the award of RM1.5 million, even after taking into account all factors in the respondent's favour, is manifestly excessive. Having regard to the very special circumstances of this case, an award of RM200,000 is a fair sum by way of a global award of damages. This award should include in it compensatory, aggravated and exemplary damages. (p 576 e-h & 577 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu, seorang peguambela dan peguamcara, telah menyiarkan fitnah libel terhadap responden, yang merupakan Timbalan Menteri Perdagangan Antarabangsa dan Industri. Kenyataan fitnah tersebut, yang disiarkan di dalam dua surat khabar harian China, adalah bahawa perayu mempunyai 'berkotak-kotak bukti' bahawa responden adalah seorang yang korap dan telah menerima suapan sebanyak RM500,000 atau RM600,000. Di pendengaran, perayu bagaimanapun gagal membuktikan tuduhannya, dan terpaksa meninggalkan pembelaan justifikasinya. Dalam halkeadaan sedemikian, yang arif hakim mendapati perayu bertanggungan dan seterusnya memerintahkan perayu membayar gantirugi sebanyak RM500,000 bagi setiap satu dari tiga kategori gantirugi (pampasan, teruk dan teladan). Terkilan, perayu merayu dan berhujah bahawa award sebanyak RM1.5 juta adalah terlampau tinggi, bahawa responden

hanya berhak kepada gantirugi nominal sahaja, dan bahawa, oleh kerana beliau tidak mendapat apa-apa keuntungan kewangan daripada serangannya ke atas responden, pemberian gantirugi teladan adalah tidak wajar dan tidak berjustifikasi. Perayu selanjutnya berhujah bahawa yang arif hakim seharusnya memberikan suatu award global, dan tidak mengagihkan award mengikut kategori-kategori di atas.

Diputuskan (mengenepi dan menggantikan award Mahkamah Tinggi)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Mengambil kira kelakuan perayu, gantirugi teruk adalah wajar dan harus diberi. Kes di sini adalah mengenai seorang perayu yang bongkak yang bukan sahaja telah memplidkan pembelaan justifikasi pada rekod, tetapi mengatakan bahawa beliau mempunyai 'berkotak-kotak bukti' terhadap responden untuk menunjukkan bahawa responden menerima RM500,000 atau RM600,000. Kotak-kotak tersebut, bagaimanapun, dan sepertimana yang berlaku, adalah semata-mata kosong dan pembelaan justifikasi terpaksa ditinggalkan.

[2] Ucapan Lord Devlin dalam *Rookes v. Barnard* [1964] AC 1129 tidak boleh diertikan sebagai memberi gambaran bahawa apa yang ingin dikatakan oleh beliau adalah bahawa pemberian gantirugi teladan harus dihadkan kepada kes-kes yang melibatkan keuntungan kewangan semata-mata. Sebarang bentuk faedah yang diperolehi oleh seseorang defendan di dalam kes fitnah, sebaliknya, adalah memadai. Faedah sedemikian juga tidak perlu mencetuskan keuntungan kewangan dengan serta merta. Memadai jika ia dengan serta merta membangkitkan faedah bukan kewangan tetapi kemudian bertukar kepada suatu faedah kewangan.

[3] Mahkamah Tinggi tidak seharusnya memberikan award yang berasingan bagi gantirugi-gantirugi teruk dan teladan, tetapi harus sebaliknya mengekalkan amalan lama yang memberikan award secara global demi mengurangkan saiz award. Apapun, award berjumlah RM1.5 juta adalah terlampau tinggi, jikapun setelah dipertimbang kesemua faktor-faktor yang menyebelahi responden. Mengambil kira halkeadaan istimewa kes di sini, suatu award gantirugi global sebanyak RM200,000 adalah adil. Award ini meliputi gantirugi-gantirugi pampasan, teruk dan teladan.

Case(s) referred to:
Cassell v. Broome [1972] AC 1027 ***(refd)***
Chong Siew Chiang v. Chua Ching Geh & Anor [1995] 1 CLJ 173 HC ***(refd)***
Dato' Musa Hitam v. SH Alatas & Ors [1991] 1 CLJ 314; [1991] 2 CLJ (Rep) 487 HC ***(refd)***
Karpal Singh v. DP Vijandran [2001] 3 CLJ 871 CA ***(refd)***
Liew Yew Tian v. Cheah Cheng Hoc [2001] 2 CLJ 385 CA ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***

Other source(s) referred to:
Gatley on Libel & Slander, 9th edn, para 32-49, p 826
Price & Duodu, *Defamation Law, Procedure & Practice*, 3rd edn, para 20-04, p 208

For the appellant - Mohamed Zaini Mazlan; M/s CL Chin & Assoc
For the respondent - Darryl SC Goon (Yvonne Ong with him); M/s Raja, Darryl & Loh

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-22-503-1994]

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

The appellant is an advocate and solicitor. He was the second defendant in the court below. This is his appeal against the award of damages made against him in respect of the libel admittedly committed by him upon the respondent. The trial judge awarded a total sum of RM1,500,000 made up of RM500,000 as compensatory damages, RM500,000 as aggravated damages and a further RM500,000 as exemplary damages. The appellant complains that these awards are excessive.

At the date of publication of the admitted libel, the respondent was the Deputy Minister for International Trade and Industry. The appellant made a charge against the respondent that was of the gravest nature. He alleged that the respondent had acted corruptly in the discharge of his duties. This charge was made at a press conference called at the appellant's behest. The story was carried by two newspapers of the Chinese vernacular. Later, the appellant repeated the defamatory words to a very limited audience – three or four journalists – outside the office of the Anti Corruption Agency where he had gone to lodge a report. He said that he had "boxes of evidence" against the respondent. As it turned out, there was no such evidence. Further, the appellant who had taken the plea of justification abandoned it in the course of the trial. We would add that there is evidence to show that the appellant was acting for a client who was facing a possible charge of extortion and had embarked

upon his chosen course of action against the respondent for the purpose of demonstrating to the world at large that he was a fearless advocate who was prepared to take on anyone irrespective of his standing.

When this appeal was called on for argument this Monday past, 11 October 2004, this court formed the view that the quantum of damages under all three heads was excessive having regard to the recent trend of awards in defamation cases. Accordingly, counsel for the respondent was called upon to show why the appeal should not be allowed and the damages reduced. Learned counsel for the respondent then drew our attention to the matters set out in para. 2 of this judgment as grounds that justified the awards in this case. He also submitted that the evidential materials relied on by the respondent were sufficiently weighty, on the very special facts of this case, to justify the very large awards made by the High Court.

Attention was called to *Liew Yew Tian v. Cheah Cheng Hoc* [2001] 2 CLJ 385, where this court held that the width or extent of a publication is always a relevant consideration when assessing compensatory damages. Counsel argued that since in that case damages of RM100,000 were awarded when the publication was only to two persons, the award of RM500,000 was not manifestly excessive here because the publication was to two newspapers, namely, China Press and Shin Min Daily News. According to the evidence, the former has a very large daily circulation while the latter has only a circulation of about 2000 copies per day. On the other hand, counsel for the appellant pointed out that the article in the China Press was not disparaging in any way of the respondent and that only that in the Shin Min was. He then argued that only nominal damages should be awarded.

In *Defamation Law, Procedure & Practice* by Price & Duodu (3rd edition, para 20-04 at p. 208) the learned authors set out the several factors that a court must take into account in assessing compensatory damages. This is what they say:

> The amount of damages awarded in respect of vindication and injury to reputation and feelings depends on a number of factors:
>
> 1. The gravity of the allegation.
> 2. The size and influence of the circulation.
> 3. The effect of the publication.
> 4. The extent and nature of the claimant's reputation.
> 5. The behaviour of the defendant.
> 6. The behaviour of the claimant.

This list is most helpful. But it must be borne in mind that this is not by any means exhaustive of the matters which the court may take into account when making an assessment.

In *Karpal Singh v. DP Vijandran* [2001] 3 CLJ 871, this court reduced an award of RM500,000 to RM100,000 on the ground that the award was out of sync with the latest trend of awards. The plaintiff in that case was also a politician. So was the defendant. Both were lawyers. The conduct of both of them was relevant and was taken into account as follows:

> The respondent relied on his position as a public figure in this suit. But the same members of the public who would have read the reports in the two newspapers would also have read in all the newspapers in the country about him and the reasons leading to the resignation of the respondent from the post of Deputy Speaker and his downfall in politics. It would not be correct to say that the plaintiff's standing, character, credit and reputation as a public figure was at its pinnacle at the time the libel was committed and totally collapsed because of this libel. In any event, he certainly cannot claim to enjoy a higher standing, credit and reputation as a public figure than Dato' Musa bin Hitam who was only awarded RM100,000 for such a serious libel published just before the UMNO General Assembly.
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> ...
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> Now, coming to the appellant. He is a well known lawyer and politician. He was a member of Parliament and a state Assemblyman representing opposition at that time. It is common knowledge that he was responsible for exposing the respondent culminating in the respondent's political downfall. The cheque incident gave him another opportunity to further ruin the respondent. He utilized it to the fullest. The fact that his press statement was typed on his 'Member of Parliament' letterhead with his party symbol and the fact that he signed the press statement as 'Deputy Chairman, DAP, Malaysia' and 'Member of Parliament, Malaysia' shows his political motive. He did not apologize. And he stood his ground throughout. That is the scenario.
>
> In the circumstances, I am of the view that the award made by the learned trial judge is excessive. A total award of RM100,000 would be more reasonable.

Karpal Singh v. DP Vijandran is readily distinguishable from the present case. The conduct of the plaintiff and the defendant there was fairly similar and more or less cancelled each other out. So the award of RM100,000 was entirely justified. But that is not the case here. In the present instance, the respondent is a man of high reputation and has in no way misconducted himself either before or at the trial. By contrast, the appellant made a monstrous charge against a man whose honesty has never been called into question. As such the award in *Karpal Singh v. DP Vijandran* is not a useful comparable.

Dato' Musa bin Hitam v. SH Alatas & Ors [1991] 1 CLJ 314; [1991] 2 CLJ (Rep) 487 is also distinguishable on the ground that at the date of the libel the plaintiff in that case no longer held public office as a member of the elected Executive. But it is to be observed that in that case Lim Beng Choon J made a single global award of RM100,000 that included both compensatory and aggravated damages.

On the award of aggravated damages learned counsel for the respondent referred us to *Gatley on Libel & Slander* (9th edn, para 32-49 at p. 826) which reads:

> However, the defendant is not confined to evidence of malice when seeking aggravated damages. Thus the fact that the defendant has pleaded justification, and attempted at the trial to establish the plea by persisting in the charge, can be taken into account by the jury in assessing damages if they find that the plea is not sustained. A *fortiori* if the defendant does not attempt to establish the plea at the trial but does not abandon it. Indeed it has been held that the mere fact that the defendant has placed a plea of justification on the record is a matter the jury can consider when estimating damages, even though the defendant withdraws the plea at trial. It has been doubted whether mere failure to make an apology can ever justify aggravation of damages. But the weight of recent authority is to the effect that the absence of an apology can, depending on the facts of the case, increase injury to feelings.

It was submitted that based on the appellant's conduct aggravated damages should be awarded. We think that there is merit in the respondent's submission. Here we have a case of an arrogant appellant who not only put a plea of justification on record but said that he had "boxes of evidence" against the respondent to show that the latter had accepted RM500,000 or even RM600,000. The boxes, as it transpired were empty and the plea of justification was withdrawn. We are therefore unable to accept the submission by the appellant that the respondent should receive only nominal damages. That submission contains the suggestion that the respondent is of poor character meriting to receive only nominal damages, in our view, itself constitutes an aggravating factor. It is established that in an action in defamation, the way in which a defendant conducts the trial or an appeal may be grounds for awarding aggravated damages.

Next is the claim for exemplary damages. It is the submission of learned counsel for the appellant that no exemplary damages should be awarded as his client did not profit monetarily from the attack on the respondent. In support of his submission he relies on the well-known passage in the speech of Lord Devlin in *Rookes v. Barnard* [1964] AC 1129 affirmed by the House in *Cassell v. Broome* [1972] AC 1027. The learned Law Lord said that there are only two category of cases in which exemplary damages may be awarded. The first is not relevant here. Of the second he said:

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

With respect, we do not think it a fair interpretation of Lord Devlin's speech when read as a whole that he intended that grant of punitive or exemplary damages to be limited only to cases of monetary profit. That is too narrow an interpretation. In our judgment, any form of advantage gained by a defendant in a defamation case suffices. It need not produce an immediate profit in money terms as happened in *Dato' Musa bin Hitam v. SH Alatas & Ors*. It may produce an immediate non-pecuniary advantage that may translate itself into a monetary reward sometime later. Take this very case. The appellant by his tortuous conduct wanted to impress members of the Chinese community that he was an advocate who feared no one, not even a Deputy Minister of the Government when it came to advancing his client's cause. Reasonable persons who read his statement may well decide to retain his services because of the impression created by him. So, he stood to gain from what he did. This is accordingly a suitable case to make an award of exemplary damages. We agree with the approach adopted by Richard Malanjum J in *Chong Siew Chiang v. Chua Ching Geh & Anor* [1995] 1 CLJ 173, where he suggested that the benefit obtained by a defendant who libels a plaintiff may be financial or otherwise.

There is one matter of some importance that this case has raised. It appears to be the respondent's argument that separate awards for aggravated and exemplary damages should be made. That is what the High Court did. With respect, we disagree with this approach. For many years it was thought that in all cases of tort global awards should be made, including in claims for personal injuries. However, only in respect of claims for personal injuries, when the courts started awarding interest at different rates on the different heads of damages, it became necessary for courts to make separate awards for pain and suffering and loss of amenities, actual loss of income, future loss and special damages. But in defamation cases it is never the practice to award interest on each separate head of damages. Interest is merely granted on the single award. In our judgment, we should, in defamation cases, maintain the age old practice of making a global award in order to limit the size of awards. Otherwise we will have runaway damages once again. The speech of Lord Hailsham in *Cassell v. Broome* appears to fairly support the view we take of the matter.

We have considered and taken into account all the factors operating in the respondent's favour. Yet, we are of the view that the award of RM1,500,000 is manifestly excessive. It is certainly far in excess of the range of awards in defamation cases. In our judgment, having regard to the very special circumstances of this case, an award of RM200,000 is a fair sum by way of a global award of damages. We are conscious that this award is twice the size of those made in recent cases. But it is made to meet the very special circumstances of this case. The award herein includes in it compensatory, aggravated and exemplary damages.

For the reasons already given, this appeal is allowed. The award of RM1,500,000 made by the High Court is set aside. In its place a sum of RM200,000 is substituted.

Now for the question of costs. This is a case in which liability is not in issue. It is only a quantum question. In our view, the appellant has misconducted himself both at the trial and on the appeal in the manner already explained. He should therefore be deprived of his costs here. We would therefore make no order as to costs in this appeal and direct the deposit to be refunded to the appellant. But we will not disturb the order for costs made by the High Court. Those proceedings were necessitated by the appellant's conduct. He must pay those costs.